

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2018] NZEnvC 135

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to section 120 of the Act
BETWEEN	BUNNINGS LIMITED
	(ENV-2018-CHC-15)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court: Environment Judge J R Jackson
(Sitting alone under section 279(1) of the Act)

Hearing: at Queenstown on 3 August 2018

Appearances: D Minhinnick and G Cameron for Bunnings Limited
J Wilson for Queenstown Lakes District Council
G Todd and B Gresson for H&J Smith Limited (section 274 party)

Date of Decision: 14 August 2018

Date of Issue: 14 August 2018

PROCEDURAL DECISION

- A: Under section 279(1)(a) of the Resource Management Act 1991 the Environment Court strikes out the section 274 notice by H&J Smith Limited.
- B: Costs are reserved. Any application should be made within 10 working days, any reply within a further 10 working days and final reply within a further 5 working days.



REASONS

Introduction

[1] The appellant, Bunnings Limited ("Bunnings"), has applied to strike out a section 274 party H & J Smith Limited ("HJSL").

[2] The interlocutory application is brought under a substantive appeal by Bunnings against a decision by Queenstown Lakes District Council ("QLDC") declining Bunnings' application for resource consent to construct and operate a trade supplier activity at 148-150 Frankton-Ladies Mile Highway, Frankton.

[3] HJSL joined as a party under section 274 of the Resource Management Act ("the Act" or "RMA"). Bunnings has now applied¹ under section 279 RMA for orders that:

A. HJSL:

- (a) is a trade competitor of Bunnings;
- (b) submitted on Bunnings' application for resource consent contrary to section 308B(2) of the RMA; and
- (c) is therefore precluded under section 274 of the RMA from becoming a party to the Proceedings.

B. In the alternative, if the court finds that HJSL is not a trade competitor of Bunnings, that HJSL's case should be struck out under section 279(4)(c), on the grounds that allowing its case to be taken further would otherwise be an abuse of the court's process.

[4] The application is supported by the affidavit of B G Hutchinson dated 6 June 2018.

[5] HJSL opposes² the application. The QLDC does not oppose Bunnings' primary order, if the court agrees with its Commissioners' finding at first instance (while reserving its position on the alternative order)³. Counsel for the QLDC was excused attendance at the hearing.

¹ Application for orders dated 6 June 2018.

² Notice of opposition dated 2 July 2018.

³ Memorandum of counsel for QLDC dated 8 June 2018 at [4].



[6] Bunnings' primary order seeks that HJSL is precluded from joining the proceedings as they are a trade competitor and joined contrary to section 308B(2) RMA due to HJSL's ties – via its parent company – to a business called Mitre 10 MEGA which operates in Frankton less than 500 metres away from the subject site of the application.

[7] In relation to the primary order, the parties agree the issues are as follows⁴:

- (a) is HJSL a trade competitor of Bunnings?
- (b) if the answer to (a) is yes, was HJSL's submission made contrary to section 308B(2) of the RMA?
- (c) if the answer to (b) is yes, is HJSL precluded under section 274(1) of the RMA from becoming a party to proceedings?

[8] I will deal with the primary application first before considering the alternative application if necessary.

The facts

[9] Bunnings undertakes business as a supplier of hardware and home improvement related products in the Australasian market. The products and services offered by a business called Mitre 10 MEGA Queenstown ("Mitre 10") and Bunnings are similar⁵. Mitre 10 and Bunnings are two of the dominant trade suppliers in the New Zealand market.

[10] An important issue is the relationship between the section 274 party HJSL and the owner of Mitre 10. To understand that I will set out the (agreed) inter-relationships in the H&J Smith Group.

The H&J Smith Group

[11] HJSL has operated in the Queenstown region since 1970 with various stores and formats over these years, including department stores, hardware and furniture businesses, an outdoor store and an electrical contracting business. It currently operates

⁴ Agreed statement of facts and issues dated 10 July 2018 Appendix 2.

⁵ Agreed statement of facts and issues dated 10 July 2018 Appendix 1 at [16].



premises in Remarkables Park – on the southern side of the airport – for the retailing of mixed goods, primarily clothing, shoes and furniture in a “department store” style. HJSL also operates an outdoor store for retailing of bikes, hunting equipment, adventure apparel and equipment and other associated products elsewhere in Remarkables Park.

[12] Elsewhere, HJSL also operates department stores in Invercargill, Gore, Balclutha, Te Anau, Dunedin and Mosgiel.

H&J Smith Holdings Limited

[13] H&J Smith Holdings Limited is a parent company of a number of wholly-owned subsidiary companies, including:

- HJSL;
- Cross Roads Properties Limited (“Cross Roads”);
- H&J’s Hardware Limited; and
- Shotover Hardware Limited (“SHL”).

[14] Cross Roads owns the land on which both the Mitre 10 MEGA Queenstown and Invercargill stores are based.

[15] H&J’s Hardware Limited historically traded as “H&J’s Mitre 10 Remarkables Park”. The Remarkables Park store closed when the Mitre 10 MEGA Queenstown opened on the northern side of the airport and the company is not operating now. This company is not relevant to the application.

[16] SHL is the owner and operator of Mitre 10 in Frankton Flats, as described above.

[17] H&J Smith Holdings Limited also has a 75% share in Corner Trading Limited. The other 25% is held by a family trust belonging to the Smith family. Corner Trading Limited operates the Mitre 10 MEGA store in Invercargill.

[18] A summary of the directorship and shareholding of those companies is:



Company	Directors	Shareholders
H&J Smith Limited	1. Noeline Gillies 2. Jason Smith 3. John Smith 4. Belinda Thomas 5. John Ward	100% H&J Smith Holdings Limited
Cross Roads Properties Limited	1. Noeline Gillies 2. Jason Smith 3. John Smith 4. Belinda Thomas 5. John Ward	100% H&J Smith Holdings Limited
Shotover Hardware Limited	1. Noeline Gillies 2. Jason Smith 3. John Smith 4. Belinda Thomas 5. John Ward	100% H&J Smith Holdings Limited
Corner Trading Limited	1. Noeline Gillies 2. Jason Smith 3. John Smith 4. Belinda Thomas 5. John Ward	75% H&J Smith Holdings Limited 25% ZEC Limited

[19] Together with their parent company H&J Smith Holdings Limited, the four companies in the left-hand column will be called "the H&J Smith Group".

Bunnings' application for resource consent

[20] In April 2017, the appellant applied for consent to develop its site to accommodate a Bunnings trade supplier activity, which included a main warehouse, nursery, timber trade sales, building materials and landscape yard, with associated parking, access, landscaping, earthworks and signage.

[21] The site and surrounding area is zoned as Frankton Flats Special Zone (B), Activity Area E1 in the Operative Queenstown Lakes District Plan ("the ODP"). The development is classified as a retail activity which is a non-complying activity in that zone.



[22] The application was publicly notified on 23 August 2017. Four submissions were received, including one from HJSL dated 20 September 2017. This opposed the application on the grounds that the application would cause (*inter alia*):

- adverse effects on the environment that are more than minor, in particular, effects on visual amenity and industrial land supply; and
- adverse impacts on the amenity of the existing town centres and business zones where such an activity should be located and where opportunities exist for it to be located.

[23] HJSL's submission did not:

- (a) specify any direct effect on it; or
- (b) make a declaration as to whether HJSL is a trade competitor of Bunnings or not.

[24] A hearing of the application was held before Council appointed Commissioners on 16 and 17 January 2018 in Queenstown. At the Council hearing, three submitters opposed the application, including HJSL. The fourth submitter, the New Zealand Transport Agency took a neutral position.

[25] Counsel for HJSL was present at the Council's hearing and gave oral submissions on the application. HJSL did not call any evidence at the hearing but instead relied upon the expert evidence provided by Council.

[26] The Commissioners declined resource consent in a decision dated 9 March 2018. In relation to HJSL, the Commissioners found that company:

- (a) was a trade competitor of Bunnings;
- (b) did not state in its submission or provide evidence as to how it was directly affected by Bunnings' application; and
- (c) was not directly affected by the application.

[27] Bunnings filed an appeal of the decision to the Environment Court in Christchurch on 29 March 2018.



[28] HJSL gave notice of its wish to become a party to the appeal on 23 April 2018. The notice stated:⁶

- (a) [HJSL] opposed the relief sought by Bunnings in the appeal;
- (b) that HJSL was not a trade competitor for the purpose of section 308C nor 308CA of the RMA; and
- (c) that HJSL's interest related to adverse landscape and visual effects of the proposed Bunnings' store and associated signage, and the adverse effects on the supply of industrial zoned land.

[29] Bunnings wrote to HJSL's legal counsel on 24 May 2018:

- (a) alleging that HJSL is a trade competitor which is not directly affected by the application;
- (b) stating that HJSL has breached section 308B(2) of the RMA and is barred from joining Bunnings' appeal under section 274(1) of the RMA;
- (c) requesting that HJSL withdraw its section 274 notice and confirm taking no further part in the appeal; and
- (d) stating that, in the absence of withdrawal, Bunnings would seek orders to prevent HJSL from participating further in its appeal.

[30] HJSL's counsel responded shortly after on 24 May 2018 inviting Bunnings to seek orders and proposing that mediation for the appeal be put on hold while this is resolved.

The RMA provisions about trade competitors

[31] For reasons which will become clear later, the first relevant provision of the RMA is the (very wide) definition of "person" in section 2 of the Act. It reads:

person includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate

[32] Section 274(1) RMA then states (relevantly):

- (1) The following persons may be a party to any proceedings before the Environment Court:

...

⁶ Agreed statement of facts and issues dated 9 July 2018 at 31.



- (e) a person who made a submission to which the following apply:
 - (i) it was made about the subject matter of the proceedings; and
 - (ii) section 308B(2) [was] irrelevant to it;
- (f) a person who made a submission to which the following apply:
 - (i) it was made about the subject matter of the proceedings; and
 - (ii) section 308B(2) ... was relevant to it; and
 - (iii) it was made in compliance with ... section 308B(2).

...

- (3) The notice given under subsection (2) must state—
 - (a) the proceedings in which the person has an interest; and
 - (b) whether the person supports or opposes the proceedings and the reasons for that support or opposition; and
 - (c) if applicable, the grounds for seeking representation under subsection 1(c) or (d); and
 - (d) an address for service.
- (4) A person who becomes a party to the proceedings under this section may appear and call evidence in accordance with subsections (4A) and, if relevant, (4B).
- (4A) Evidence must not be called under subsection (4) unless it is on matters within the scope of the appeal, inquiry, or other proceeding.
- (4B) However, in the case of a person described in subsection (1)(e) or (f), evidence may be called only if it is both—
 - (a) within the scope of the appeal, inquiry, or other proceeding; and
 - (b) on matters arising out of that person's submissions in the previous related proceedings or on any matter on which that person could have appealed.

[33] The references to section 308B are to provisions about “trade competitors” which are contained in Part 11 of the RMA. The heading for Part 11A states: “Act not to be used to oppose trade competitors.” Then section 308A states:

308A Identification of trade competitors and surrogates

In this Part—

- (a) **person A** means a person who is a trade competitor of person B;
- (b) **person B** means the person of whom person A is a trade competitor;
- (c) **person C** means a person who has knowingly received, is knowingly receiving, or may knowingly receive direct or indirect help from person A—
 - (i) to bring an appeal or be a party to an appeal against a decision under this Act in favour of person B;
 - (ii) to be a party to a proceeding before the Environment Court that was lodged by person B under section 87G, 149T, 165ZFE(9)(a)(ii), 198E, or 198K.

In a nutshell, Bunnings submits that it is person B and that HJSL is a person A within the meaning of this section.



[34] Section 308B states:

308B Limit on making submissions

- (1) Subsection (2) applies when person A wants to make a submission under section 96 about an application by person B.
- (2) Person A may make the submission only if directly affected by an effect of the activity to which the application relates, that—
 - (a) adversely affects the environment; and
 - (b) does not relate to trade competition or the effects of trade competition.
- (3) Failure to comply with the limits on submissions set in section 149E or 149O or Schedule 1 is a contravention of this Part.

The terms “trade competition” and “trade competitor” are not defined in the RMA. The general test as to whether trade competition exists between two entities is whether there is a “competitive activity having a commercial element”⁷. This approach was affirmed by the Environment Court in *Kapiti Coast Airport Holdings v Alpha Corporation Limited*⁸.

[35] To place Part 11A in context it is important to recall that the common law has long recognised the benefits of trade and of free and open markets⁹ (subject of course to specific statutory restraints). In *Montessori Pre-School Charitable Trust v Waikato District Council*¹⁰, Baragwanath J also observed that section 1A of the Commerce Act 1986 has as its purpose¹¹:

... to promote competition in markets for the long-term benefit of consumers within New Zealand.

and continued¹² that:

It is reasonable to infer that section 104(3)(a) RMA has a similar purpose.

[36] Yet section 104(3)(a) states that a consent authority must not have regard to trade competition when considering an application. As the Environment Court observed two decades ago – in *Queenstown Property Holdings Ltd v Queenstown Lakes District*

⁷ *Montessori Pre-School Charitable Trust v Waikato District Council* (2006) 1 NZTR 16-008; [2007] NZRMA 55 at [19].

⁸ *Kapiti Coast Airport Holdings v Alpha Corporation Limited* [2016] NZEnvC 137; [2016] NZRMA 505.

⁹ *Montessori Pre-School Charitable Trust v Waikato District Council* above n 7.

¹⁰ *Montessori Pre-School Charitable Trust v Waikato District Council* above n 7.

¹¹ *Montessori Pre-School Charitable Trust v Waikato District Council* above n 7 at [18].

¹² *Montessori Pre-School Charitable Trust v Waikato District Council* above n 7 at [18].



*Council*¹³ (“the Gorge Road supermarket case”) it is not all effects of trade competition which are to be disregarded but only the anti-competitive – or “rent-seeking”¹⁴ – ones. I consider the broad language in section 104(3) and Part 11A RMA needs to be read subject to that qualification in order for New Zealand commercial law, including the RMA, to continue its trend toward being, as Baragwanath J put it, a “seamless whole”¹⁵.

Consideration

Is HJSL a trade competitor of Bunnings?

[37] It is clear on the facts that there is a “competitive activity having a commercial element” between Mitre 10 and Bunnings. Indeed, the parties acknowledge that the companies are two of the dominant trade suppliers in New Zealand¹⁶. It is not, however, Mitre 10’s owner SHL that has joined this appeal but its sister company HJSL, so the first question is whether HJSL is a trade competitor of Bunnings.

[38] HJSL operates premises in Remarkables Park for the retailing of mixed goods, primarily clothing, shoes and furniture in a “department store” style¹⁷. Mr Minhinnick does not submit that these activities bring HJSL into direct trade competition with Bunnings, rather that I should look at the wider corporate structure behind HJSL to determine whether the H&J Smith Group can be considered a trade competitor¹⁸.

[39] In summary, the basic corporate structure of the H&J Smith Group is uncontested¹⁹: HJSL is wholly owned by its parent company H&J Smith Holdings Limited. H&J Smith Holdings Limited also wholly owns Cross Roads and SHL. Cross Roads owns the land that Mitre 10 operates from while SHL owns and operates the store²⁰. All four companies share the same directorship and the same shareholding²¹.

¹³ *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 245.

¹⁴ This rather awkward term is how economists tend to describe non-productive activities by trade competitors: the classic academic example is the medieval baron who put a chain across a river and charged tolls for boats to pass. (R Shiller *The Best, Brightest and Least Productive?* Project Syndicate on Wikipedia *Rent-seeking*, searched 3 August 2018).

¹⁵ *Montessori Pre-School Charitable Trust v Waikato District Council* above n 7 at [18].

¹⁶ Agreed statement of facts and issues dated 10 July 2018 at Appendix 1 at [15].

¹⁷ Agreed statement of facts and issues dated 10 July 2018 at Appendix 1 at [4].

¹⁸ Synopsis of submissions for the appellant at 4.9.

¹⁹ Agreed statement of facts and issues dated 10 July 2018 Appendix 1.

²⁰ Affidavit of B G Hutchison dated 6 June 2018 at [5.4].

²¹ Agreed statement of facts and issues dated 10 July 2018 at Appendix 1 at [12].



[40] H&J Smith Holdings Limited and HJSL have had a long association with several Mitre 10 stores as traversed in Mr Hutchison's affidavit²². Counsel for Bunnings submits that due to the companies' same shareholding and directorship they "can be presumed to have the same directing mind and will"²³.

[41] While HJSL acknowledges that Cross Roads and SHL are connected via their parent company H&J Smith Holdings Limited, counsel submits that the association does not mean HJSL itself is a trade competitor. Mr Todd says that just because two separate businesses are owned by identical shareholders, that does not mean that both of the businesses are competitors in trade to a third party (here Bunnings) just because one is. He submitted that directors should always act independently and in the (separate) best interests of each of the businesses they direct²⁴.

[42] Mr Minhinnick put forward two answers to that:

- (1) that the H&J Smith Group and all its members are one "person" under the RMA; and
- (2) under the RMA that the corporate veil should be lifted and when it is, the picture revealed is of one set of real persons acting to advance their joint interests.

[43] The first argument derives from *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd*²⁵. In that case General Distributors Ltd ("GDL") sought a declaration that Foodstuffs was in breach of sections 96 and 308B of the RMA. The Environment Court described²⁶ the differences between the structures and businesses of the protagonists as:

General Distributors Ltd both owns the supermarket sites and carries on the retail supermarket trading. Foodstuffs Properties (Wellington) Ltd owns the supermarket sites and leases them to franchisees who conduct the retail trading. Mr Williams argues therefore that Foodstuffs is not a trade competitor of GDL because it does not engage in retail trading.

²² Affidavit of B G Hutchison dated 6 June 2018 at [6.2] to [6.9].

²³ Synopsis of submissions for the appellant at 4.15(e).

²⁴ Submissions on behalf of H&J Smith Limited dated 23 July 2018 at 8 and 12.

²⁵ *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* [2011] NZEnvC 212; (2011) 16 ELRNZ 573 [2012] NZRMA 215.

²⁶ *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* [2012] NZRMA 215 (NZEnvC) at [15].



[44] The court then held that²⁷:

Taking the broad definition of *person* in section 2 of the RMA, which is: - *includes the Crown, a corporation sole, and also a body of persons, whether corporate or unincorporate*: the groups of individuals and corporates forming either the GDL or Foodstuffs camps would be a *person* for the purposes of section 308B, and subject to the limitation on making *trade competition* submissions. Such an interpretation best fits the purpose of the provision – to prevent trade competitors using the RMA for purposes other than the protection of the environment. Exactly what structure or form a would-be competitor chooses to adopt is irrelevant to that issue, and there can of course be no doubt that the GDL organisation and the Foodstuffs organisation are competitors in the supermarket trade.

The Environment Court found – taking the broad definition of “person” in section 2 RMA – that a group of individuals and corporates can be a “person” for the purposes of section 308B and subject to the limitation on making trade competition submissions. This is consistent with the purpose of the provision, which is to prevent trade competitors using the RMA for purposes other than protection of the environment. Further, the court found that “exactly what structure or form a would-be competitor chooses to adopt is irrelevant”²⁸.

[45] The difference between the *General Distributors*’ case and this case is that the alleged person A under section 308A – HJSL – is one legal entity further away from being in the same business or market as person B (here Bunnings). The exact equivalent to the *General Distributor*’s case and this one would have been if Cross Roads, as owner of the Mitre 10 site, had been the submitter. But instead it is another company in the H&J Smith group which was the submitter and which lodged the section 274 notice.

[46] I hold that all members of the H&J Smith Group, including HJSL, are one person for the purposes of section 2 RMA, and hence each of them is a person A for the purposes of section 308A and part 11A of the RMA.

[47] The H&J Smith Group is clearly linked with Mitre 10. That store would compete with a Bunnings in Frankton. The purpose of section 308B is to ensure the RMA is not used by trade competitors for commercial gain by keeping competitors out of the relevant market. In light of this, H&J Smith Holdings Limited and HJSL can be considered to be trade competitors of Bunnings on this application.

²⁷ *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* above n 25 at [16].

²⁸ *General Distributors Ltd v Foodstuffs Properties (Wellington) Ltd* above n 25 at [16].



[48] Mr Minhinnick also submitted that the *General Distributors'* approach is consistent with the circumstances where the courts will allow the "corporate veil" to be pierced. In *Chen v Butterfield*²⁹ Tipping J wrote:

In essence the corporate veil should be lifted **only if in the particular context and circumstances its presence would create a substantial injustice which the Court simply cannot countenance.** Whether that is so must be judged against the fact that corporate structures and the concept of separate corporate identity are legitimate facets of commerce. They are firmly and deeply engrained in our commercial life. If they are genuinely and honestly used they should not be set aside. In any event something really compelling must be shown to go behind them.

(emphasis added)

[49] The reasons for looking at the nature of the personalities involved or for going behind the corporate veil in this situation is the suspicion that members of the H&J Smith Group are "rent-seeking" as described in the Gorge Road supermarket case – another case involving trade competition in this district. Accordingly I consider the common directorships of the members of the group can be regarded as acting (in the absence of any evidence to the contrary) for a common purpose.

[50] If HJSL was truly concerned with the loss of industrial land to retail activities, it is likely that it would also have opposed Cross Roads' application for the Mitre 10, or the application for the Pak'nSave supermarket nearby. That was pointed out by the Commissioners at the Council hearing, but no satisfactory explanation was given then or now. Mr Hutchison deposes that the answer lies in the common ownership of HJSL and Cross Roads, and the close association between HJSL and Foodstuffs³⁰.

[51] In view of my earlier finding about the unincorporated group of persons which is the H&J Smith Group, I do not have to consider whether I should pierce the corporate veil and consider the implications of the common directorships and shareholdings. However, I would have leaned towards finding a common purpose if I had needed to look behind the surface of the companies.

²⁹ *Chen v Butterfield* (1996) 7 NZCLC 26,086 (HC) at 260, 092.
³⁰ Affidavit of Bryce Gavin Hutchison at [7.5].



Is HJSL directly affected?

[52] A person who is a trade competitor may make a submission on a competitor's application only if:

- (a) it is directly affected by an effect of the activity that adversely effects the environment; and
- (b) that effect does not relate to trade competition or the effects of trade competition.

[53] The *Concise Oxford Dictionary* defines "directly" as meaning:

[...] adv. 1 without an intermediary or intervening factor [...] 2 by a direct route [...]

The use of the term "directly" in section 308B is intended to reduce the sets of effects which permits participation by a trade competitor. Obviously "indirect" effects are excluded, and so too would be "consequential" effects.

[54] HJSL's submission in opposition to Bunnings' application alleged that the proposal would have an adverse effect on the supply of industrial zoned land at Frankton. Mr Todd submits if there is less land on which industrial activities can be established in the district this will have an adverse effect on retailers and the customers they serve³¹.

[55] Bunnings submits that the circumstance identified above is in fact an indirect effect as HJSL does not itself occupy industrial land³². The steps in Mr Minhinnick's argument are:

The circumstance identified by H&J Smith Limited above is the definition of an "indirect" effect. The basic logic of the "effect" is that:

- (a) A Bunnings Warehouse occupies land otherwise intended for warehousing and transport yard activities in the District.
- (b) Available industrial land supply within the District reduces.
- (c) As a result, the price of industrial land within the District increases, or, in the event that supply is exhausted, occupiers are forced to look elsewhere. In the case of the latter, logistics and transport costs to those occupiers to access the District market increase.

³¹ Notice of opposition for H&J Smith Limited dated 2 July 2018 at 9 and 10.

³² Synopsis of submissions for the appellant at 4.23 and 4.24.



- (d) Occupiers of industrial land in the District pass those increased costs onto their customers (including H&J Smith Limited).
- (e) H&J Smith Limited is either:
 - (i) forced to absorb those costs itself; or
 - (ii) pass them onto its customers.

The effect in (i) above is an indirect effect. H&J Smith Limited does not itself occupy industrial land. The effect in (ii) is a twice-removed indirect effect.

[56] Nothing raised in HJSL's notice of opposition or in Mr Todd's submissions answers those points. Nor is there any evidence from HJSL from which I can find there may be a direct effect. Consequently I accept Mr Minhinnick's argument. His conclusions are supported by the Commissioners' decision to the same effect albeit in less detail.

Is HJSL precluded from becoming a party to the proceedings?

[57] Section 274(1) sets out that a person who made a submission on an application for resource consent can be a party to proceedings if that submission was made about the subject matter of the proceedings and either section 308B(2) was irrelevant³³ to the party or relevant to the party and the submission was made in compliance with it³⁴.

[58] As I have found above, HJSL is a trade competitor and their submission was made contrary to section 308B. Therefore it cannot rely on sections 274(1)(e) or (f) and lacked standing to join these proceedings. The question then is what I should do about it.

[59] Section 279 states (relevantly):

Powers of Environment Judge sitting alone

- (1) An Environment Judge sitting alone may make any of the following orders:
 - (a) an order in the course of proceedings:
 - ...
- (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers—
 - (a) that it is frivolous or vexatious; or
 - (b) that it discloses no reasonable or relevant case in respect of the proceedings;
 or



³³ Section 274(1)(e) RMA.

³⁴ Section 274(1)(f) RMA.

- (c) that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

Under section 279(1), the court has the power to determine whether or not a party has standing to participate in an appeal: *Meadow 3 Limited v van Brandenburg*³⁵. That exercise requires an assessment as to whether the party's notice complies with any of the grounds for representation in section 274(1)³⁶. If the party cannot demonstrate a sufficient interest, standing to participate should be refused³⁷.

[60] In this case HJSL does not comply with any of the grounds in section 274, and accordingly I will make an order under section 279(1) striking out the section 274 notice by HJSL.

[61] The second application was adjourned but given the orders proposed above it will be refused as unnecessary.


J R Jackson
Environment Judge



³⁵ *Meadow 3 Limited v van Brandenburg* (2008) 14 ELRNZ 267 (HC) at [17].

³⁶ *Meadow 3 Limited v van Brandenburg* (2008) 14 ELRNZ 267 (HC) at [18].

³⁷ *Bodle v Northland Regional Council* (EnvC) Whangarei A50/2002, 27 February 2002. See also *Purification Technologies v Taupo District Council* [1995] NZRMA 197 (PT).